

Dissenting Views to Accompany
H.Res. 420, Resolution of Inquiry to the Attorney General

We strongly dissent from the Majority's decision to report unfavorably H. Res. 420, a resolution of inquiry directed to the Attorney General regarding the leak of the identity of a covert operative. By doing so, the Majority has abdicated the Committee's responsibility to oversee the Justice Department and to ensure the faithful execution of the laws.

Over two years ago, in July 2003, a Bush administration official committed one of the most serious breaches of national security in recent history by disclosing to the press the identity of an undercover Central Intelligence Agency operative. Even worse, it likely was done for political reasons, to retaliate against the operative's husband for successfully challenging the President's claim that Iraq had sought nuclear material in Africa.

The purpose of this resolution was getting to the bottom of what happened due to the total absence of a good faith effort at an investigation by the administration. We believe that the Justice Department and White House slow-walked the investigation in its beginning stages. We also believe that, despite numerous White House denials early on, senior White House officials were involved in the leak. Furthermore, the President first promised that he would fire anyone involved in the leak but then changed the standard when his top political advisor was implicated. Finally, then-Attorney General John Ashcroft insisted on being briefed on Department interviews conducted in connection with the leak, notwithstanding his ties to individuals who were questioned.

This resolution of inquiry was a necessary step for getting to the truth. From Watergate to Whitewater, Congress has exercised its constitutional authority to hold the Executive accountable for its actions. A breach of national security by a Republican White House demands no less and, in fact, demands even more.

I. BACKGROUND

A. The Leak

In February 2002, the CIA sent former ambassador Joseph Wilson, IV, to Niger on behalf of the Bush administration to investigate claims that Iraq was attempting to buy yellow cake uranium in that country.¹ When Ambassador Wilson returned, he informed the CIA and the State Department that the claims were unsubstantiated.²

Nearly a year later, during his 2003 State of the Union address, the President stated that Iraq tried to purchase uranium in Africa: "The British government has learned that Saddam

¹Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry*, WASH. POST, Sept. 28, 2003, at A1. Ambassador Wilson was a diplomat for twenty-two years and served as President Clinton's Director of African affairs on the National Security Council.

²*Id.*

Hussein recently sought significant quantities of uranium from Africa.”³ In response, Ambassador Wilson published an op-ed in July 2003 publicizing his findings, or lack thereof.⁴ Approximately two weeks later, Robert Novak used his syndicated column to defend the administration’s invasion of Iraq and to call the Ambassador’s credibility into question.⁵ Painting the Ambassador’s assignment to Niger as a favor to his wife, Mr. Novak stated, “Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction. Two senior administration officials told me Wilson’s wife suggested sending him to Niger to investigate.”⁶ It soon was revealed that those administration officials called at least six members of the press to disseminate Mrs. Wilson’s undercover identity. It is widely suspected that the motivation was revenge for publicly discrediting the President’s primary justification for invading Iraq.

B. Potential Violations of Federal Statutes and Regulations

Disclosing the identity of a covert U.S. agent can be a violation of numerous federal criminal statutes and administrative regulations. Such violations carry with them penalties including imprisonment, fines, termination of employment, and revocation of security clearance. The following is a list and description of such statutes and regulations.

1. Revealing the identity of certain undercover intelligence officers, agents, informants, and sources

Subsection 421(a) of title 50, United States Code, makes it unlawful for someone, having or having had access to classified information that identifies a covert agent, to intentionally disclose such information to an unauthorized recipient knowing the disclosure identifies the agent and knowing that the government is taking affirmative measures to conceal the agent’s relationship to the United States. The penalty includes a fine, imprisonment for not more than ten years, or both.

Subsection 421(b) makes it unlawful for someone who, as a result of having access to classified information, learns the identity of a covert agent and intentionally discloses any information disclosing that identity to any person not authorized to receive it. The defendant must know that the information disclosed identifies the agent and that the government is taking steps to conceal the identity. The penalty includes a fine, imprisonment for not more than five years, or both.

Subsection 421(c) criminalizes the disclosure of any information that identifies a person as a covert agent as part of a pattern intended to identify and expose such agents and with reason to believe such activities would impair the nation’s foreign intelligence activities. Such disclosure must be to a person not authorized to receive it and be done knowing that the

³The President, State of the Union (Jan. 28, 2003).

⁴Joseph C. Wilson, IV, *What I didn’t Find in Africa*, N.Y. TIMES, July 6, 2003.

⁵Robert Novak, *The Mission to Niger*, CHICAGO SUN-TIMES, July 14, 2003, at 31.

⁶*Id.*

disclosure identifies an agent and the United States is taking steps to conceal it. The penalty includes a fine, imprisonment for not more than three years, or both.

2. Conveying public money, property or records

Section 641 of title 18, United States Code, makes it a criminal offense to convey anything of value that belongs to the United States. More specifically, it imposes criminal penalties on anyone who “embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof.” The penalty for a violation of this statute is a fine, imprisonment for not more than years, or both. The Bush administration already has used this statute to successfully prosecute a government official who leaked government information.⁷

3. Gathering, transmitting, or losing defense information

Section 793(d) of title 18, United States Code, prohibits the unauthorized transmission of any information vital to national defense. It makes it a crime for anyone who has lawful possession of “information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, [to] willfully communicate, deliver, transmit . . . to any person not entitled to receive it.” The penalty for a violation of this law includes a fine, imprisonment for not more than ten years, or both.

4. Gathering or delivering defense information to aid a foreign government

Subsection 794(a) of title 18, United States Code, prohibits the transmission or delivery of any document or information related to national defense to any foreign government or foreign agent. Such conduct is illegal if even the transmission is direct or indirect. The penalty includes death or imprisonment for any term of years.

5. Leaking diplomatic codes and correspondence

Section 952 of title 18, United States Code, imposes criminal penalties on “whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code . . . and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter.” The penalty includes a fine, imprisonment for not more than ten years, or both.

⁷See John Dean, *It Doesn't Look Good for Karl Rove*, CNN.COM, July 15, 2005. Jonathan Randel, a former Drug Enforcement Administration employee, leaked to the media the fact that the name Lord Michael Ashcroft of Great Britain appeared in the DEA's money laundering files. In 2002, the Justice Department obtained an indictment against Mr. Randel for violating section 641. Mr. Randel ultimately pled guilty and was sentenced to one year in prison and three years of probation. While he was sentencing Mr. Randel, U.S. District Judge Richard Story stated, “Anything that would affect the security of officers and of the operations of the agency would be of tremendous concern, I think, to any law-abiding citizen in this country.”

6. Communication of classified information by government officer or employee

Subsection 783(a) of title 50, United States Code, prohibits any government officer or employee, without authorization of the President or head of the employing department, from communicating in any manner to any other person whom the officer or employee knows or has reason to believe is an agent or representative of a foreign government any information classified by the President or head of an agency that affects national security. The officer or employee must know or have reason to know that the information was classified. The penalty includes a fine of not more than \$10,000, imprisonment for not more than ten years, or both. In addition, the person would be ineligible to hold any office created by the Constitution or laws of the United States.

7. Executive Order 12958

Presidential Executive Order 12958 prescribes a uniform system for classifying, declassifying, and protecting information related to the national defense. It requires each agency head to implement controls over the distribution of classified information. Section 5.5 provides that, if the Director of the Information Security Oversight Office finds that a violation of the Order has taken place, the Director must report to the appropriate agency head so corrective action may occur. Further, sanctions for such violations include: "reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation."

Finally, section 5.5 of the Order provides that:

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior official shall: (1) take appropriate and prompt corrective action when a violation or infraction . . . occurs; and (2) notify the Director of the Information Security Oversight Office when a violation . . . occurs.

In effect, any supervisor of an individual with access to classified information must sanction such individual if he illegally discloses the information.

8. Classified Information Nondisclosure Agreement (SF-312)

Prior to gaining access to classified information, a government official or employee must sign a Classified Information Nondisclosure Agreement (SF-312). The Agreement states that breaches (i.e., disclosure of classified information) could result in termination of security clearances and removal from employment.

II. THE ADMINISTRATION HAS FAILED TO COOPERATE WITH THE INVESTIGATION

The Executive Branch's handling of the leak has been rife with political and procedural irregularities. Initially, the Justice Department failed to open an investigation into the leak. Immediately after Mr. Novak's piece was published, the CIA contacted the Justice Department four times in the span of three weeks to (1) notify it that the disclosure of Wilson's name and covert status probably violated the law and (2) to request a criminal investigation.⁸ On September 29, 2003, over a month after the first CIA notification, the Department finally confirmed that the FBI would investigate the leak.

Unfortunately, the Department's handling of the case still was subject to delays and conflicts of interest. For example, the Department waited three days before notifying the White House of the investigation, and the White House in turn waited eleven hours before asking all White House staff to preserve any evidence.⁹ What evidence that employees have turned over have been screened for "relevance" by White House counsel, perhaps filtering out critical information.¹⁰ With respect to the pace of the investigation, FBI sources were quoted as saying that the Department was "going a bit slower on this one because it is so high-profile."¹¹ For many, all these factors have worked in tandem to create at the very least the appearance of impropriety warranting some sort of independent investigation.

Also, law enforcement officials close to the investigation have indicated that then-Attorney General Ashcroft was personally and privately briefed on FBI interviews of Karl Rove, then a senior advisor to the President and now the Deputy White House Chief of Staff.¹² This disclosure is troubling because, at the time of these events, Mr. Ashcroft had personal and political connections to Mr. Rove. Mr. Rove was an adviser to Mr. Ashcroft during the latter's political campaigns, earning almost \$750,000 for his services. Mr. Rove also had urged the President to nominate Mr. Ashcroft to be Attorney General after Mr. Ashcroft lost his Senate re-election campaign to the deceased Mel Carnahan. The fact that Mr. Ashcroft eventually recused himself demonstrates that there in fact were conflicts of interest with his continued involvement in the investigation. The fact that he did not recuse himself early on and was briefed on the matter may well have violated ethical rules and guidelines.¹³

⁸Letter from Stanley M. Moskowitz, Director of Congressional Affairs, CIA, to the Honorable John Conyers, Jr., Ranking Member, U.S. House Comm. on the Judiciary (Jan. 30, 2004).

⁹*Investigating Leaks*, N.Y. TIMES, Oct. 2, 2003, at A30 (editorial).

¹⁰Richard Stevenson & Eric Lichtblau, *Leaker May Remain Elusive, Bush Suggests*, N.Y. TIMES, Oct. 8, 2003, at A28.

¹¹Richard Stevenson & Eric Lichtblau, *Attorney General is Closely Linked to Inquiry Figures*, N.Y. TIMES, Oct. 2, 2003, at A1.

¹²Murray Waas, *What Now, Karl? Rove and Ashcroft Face new Allegations in the Valerie Plame Affair*, VILLAGE VOICE, Aug. 13, 2005.

¹³Federal law requires the Attorney General to promulgate rules mandating the disqualification of *any* officer or employee of the Justice Department "from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or

On December 30, 2003, the Attorney General finally recused himself from the investigation.¹⁴ Then-Deputy Attorney General James Comey became the acting Attorney General for the matter and simultaneously appointed Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois, as a special counsel to lead the investigation.¹⁵ Despite the appointment of a special counsel and the empaneling of a grand jury, the investigation has been thwarted and obstructed in numerous ways despite administration promises of full cooperation.¹⁶

political conflict of interest, or the appearance thereof.” 28 U.S.C. § 528 (emphasis added). Pursuant to this requirement, the Department has promulgated regulations stating that:

no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: (1) any person . . . substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) any person . . . which he knows or has a specific and substantial interest that would be affected by the outcome of the investigation or prosecution. 28 C.F.R. § 45.2.

To reiterate the importance of preventing conflicts of interest, the Justice Department has further explicated the guidelines in its U.S. Attorneys’ Manual. The Attorneys’ Manual provides that:

When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of a personal interest or professional relationship with parties involved in the matter, they must contact General Counsel’s Office (GCO), EOUSA. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 3-2.170.

Furthermore, rules of professional conduct bar lawyers from matters in which they have conflicts of interest. Because Department attorneys must follow the ethical rules of the bar in which they practice, 28 U.S.C. § 530B, as an official at Main Justice Mr. Ashcroft would have been obligated to comply with the District of Columbia Bar’s Rules of Professional Conduct. These Rules state that, without consent, a lawyer shall not represent a client if “the lawyer’s professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer’s responsibilities to or interests in a third party or the lawyer’s own financial, business, property, or personal interests.” DISTRICT OF COLUMBIA BAR, RULES OF PROFESSIONAL CONDUCT 1.7(b)(4). The American Bar Association mimics this guideline in Rule 1.7 of its own Model Rules of Professional Conduct. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 1.7(a)(2).

¹⁴U.S. Dep’t of Justice, Deputy Attorney General Comey Holds Justice Department News Conference (Dec. 30, 2003) (statement of the Deputy Attorney General).

¹⁵*Id.* The grand jury reportedly expires on October 28, 2005, the same date on which Mr. Fitzgerald’s four-year appointment as U.S. Attorney expires.

¹⁶President Bush initially promised the full cooperation of the White House: “if there is a leak out of my administration, I want to know who it is. . . . I welcome the investigation.” The

For instance, in order for a journalist to reveal his or her source before a grand jury, he or she must receive a waiver from the source authorizing such disclosure. Absent such a waiver, the journalist would protect the First Amendment right of the press and the confidentiality agreement with the source by refusing to testify. In an attempt to get around these obstacles, prosecutors often force potential sources to sign general waivers, waivers that permit any journalist with whom they spoke to testify.¹⁷ To ensure the voluntariness of the waiver, however, journalists recognize only personal waivers that are directed to specific journalists.¹⁸ While some administration officials have granted personal waivers in the leak investigation, not all have done so, thus impeding the investigation.

It has been reported that I. Lewis “Scooter” Libby, Chief of Staff to the Vice President, met with *New York Times* reporter Judith Miller on July 8, 2003, and discussed Mrs. Wilson.¹⁹ Because this meeting took place six days before columnist Robert Novak reported the covert information, Mr. Fitzgerald reportedly determined that it is relevant to the on-going probe.²⁰ However, according to the same report, his investigation has been impeded by Mr. Libby’s failure to produce a personal waiver to Ms. Miller.²¹ Indeed, in a filing with the court overseeing the case, Mr. Fitzgerald stated he could not close the matter because of Ms. Miller’s inability to testify about conversations with senior government officials.²² In response to similar concerns expressed by Mr. Fitzgerald about *Time* reporter Matthew Cooper, Mr. Rove granted a personal waiver to Mr. Cooper.

It should be noted that Mr. Libby’s conduct is contrary to the President’s guarantees of full cooperation. The President publicly stated that his administration would “fully cooperate”

President, President Discusses Job Creation with Business Leaders (Sept. 30, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/09/20030930-9.html>).

¹⁷See Howard Kurtz, *Lawyers Secured Rove’s Waiver; Executives Hear Reporters’ Anger*, WASH. POST, July 16, 2005, at A6; Adam Liptak, *Reporter Jailed after Refusing to Name Source*, N.Y. TIMES, July 5, 2005, at A1.

¹⁸See Kurtz, *supra* note 17; Liptak, *supra* note 17.

¹⁹Murray Waas, *The Meeting*, THE AMERICAN PROSPECT ONLINE EDITION (Aug. 6, 2005) (available at <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=10077>).

²⁰*Id.*

²¹Ms. Miller apparently believes that the general waivers issued by White House officials are “inherently coercive” and inadequate.

²²See *In re: Special Counsel Investigation*, 374 F. Supp.2d 238 (D.D.C. 2005).

with the investigation.²³ Mr. Libby's failure to comply with this mandate has obstructed the inquiry.

Furthermore, the President has abandoned his duty to discipline his advisors for their roles in the leak and, in fact, has turned away from promises to discipline the leaker. He refused to respond to a request by approximately one-hundred Members of Congress that he ask Karl Rove to either disclose his role in the outing of Mrs. Wilson or resign.²⁴ Second, on July 18, 2005, the President changed the threshold for terminating staff from leaking the identity of Mrs. Wilson²⁵ to the necessity for an actual crime to have been committed.²⁶ On repeated occasions, the President has permitted his staff to mislead and/or lie to the American people in connection with this matter without disciplinary consequences. For instance, White House Press Secretary Scott McClellan assured the American people several times that neither Mr. Rove, Mr. Libby, nor National Security Council official Elliot Abrams were involved in the leak;²⁷ just these past few months, however, we learned that both Mr. Rove and Mr. Libby were sources for Mrs. Wilson's identity.²⁸ Mr. McClellan remains undisciplined for his statements, and Mr. Rove and Mr. Libby apparently still have security clearances.

The administration's failure to punish the leaker is in stark contrast to its past practice, at least with respect to punishment of administration critics. When former Bush Treasury Secretary Paul O'Neill appeared on CBS's 60 Minutes and showed "Secret" documents to support his assertion that the President planned from his first days in office to attack Iraq, the Treasury Department asked its Inspector General to investigate whether O'Neill had improperly released

²³The President, Remarks at a Joint Press Availability with Australian Prime Minister John Howard (June 3, 2004) (available at <http://www.whitehouse.gov/news/releases/2004/06/20040603-3.html>).

²⁴See Letter from the Honorable John Conyers, Jr., Ranking Member, U.S. House Comm. on the Judiciary, *et al.* to the President (July 14, 2005).

²⁵President George W. Bush, President Bush Holds Press Conference Following the G8 Summit (June 10, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/06/20040610-36.html>).

²⁶President George W. Bush, President, Prime Minister of India Discuss Freedom and Democracy (July 18, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/07/20050718-1.html>).

²⁷White House Press Secretary Scott McClellan, Press Briefing (Oct. 10, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/10/20031010-6.html>).

²⁸See Lorne Manly & David Johnston, *Reporter Says He First Learned of CIA Operative from Rove*, N.Y. TIMES, July 18, 2005, at A1.

classified documents.²⁹ The Inspector General later found that the Department itself mislabeled the documents and allowed their release.³⁰

III. THE MAJORITY'S OBJECTIONS TO H. RES. 420 ARE UNFOUNDED AND UNPRECEDENTED

The Majority has raised two primary and groundless objections to this resolution. They first contend that Congress should not investigate a matter simultaneously with the Justice Department. They also allege that the Committee is not permitted to obtain secret grand jury material, as they claim this resolution seeks to do. Each of these objections is discussed in turn.

A. Congress has Investigated Crimes Simultaneous with the Justice Department

Contrary to the Majority's claims, the Justice Department is not investigating the leak properly and passage of this resolution would not interfere with that inquiry. There are, in fact, numerous precedents for this Committee and others investigating concurrently with the Justice Department:

- In 1997, the Committee held hearings on campaign improprieties in the 1996 presidential election.³¹ In addition to taking testimony from Attorney General Janet Reno, the Committee requested all documents, including deliberative memoranda, relating to the appointment of a special counsel. The Department provided many of these documents to the Committee. The Justice Department was conducting its own investigation and determining whether an independent counsel was warranted.³²
- In 1995, the Subcommittee on Crime heard several days of testimony as part of a congressional investigation into federal actions at Waco, with soldiers, officers, ATF, FBI and Treasury Department officials testifying.³³ The full Committee took testimony from the Attorney General, the Director of the FBI, and Davidian victims.³⁴ Numerous

²⁹Dana Milbank, *White House Fires Back at O'Neill on Iraq*, WASH. POST, Jan. 13, 2004, at A1.

³⁰Michael Janofsky, *Treasury is Faulted for Papers' Release*, N.Y. TIMES, Mar. 23, 2004, at A18.

³¹*Oversight of the Department of Justice: Hearing Before the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997).

³²Attorney General Janet Reno, Statement of the Attorney General (Dec. 2, 1997).

³³*Activities of Federal Law Enforcement Agencies toward the Branch Davidians: Hearings Before the Subcomm. on Crime of the U.S. House Comm. on the Judiciary*, 104th Cong., 1st Sess. (July 28, 31 & Aug. 1, 1995).

³⁴*Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas: Hearing Before the U.S. House Comm. on the Judiciary*, 103rd Cong., 1st Sess. (Apr. 28, 1993).

criminal and civil cases relating to the Branch Davidians were pending at the time of the hearing.

- In 1990-92, the Committee investigated whether the Justice Department helped run INSLAW, a small computer company into insolvency.³⁵ The Committee subpoenaed documents, heard testimony from government officials and federal judges while an independent counsel investigated criminal allegations.
- In the 1970's, congressional committees held extensive hearings on Watergate as the Justice Department investigation was on-going.³⁶

In fact, congressional committees have long been investigating matters that are under criminal review by the executive branch. For example:

- From 2004-2005, the House Government Reform Committee,³⁷ the House Energy and Commerce Committee,³⁸ the House Appropriations Committee, and the Senate Homeland Security and Governmental Affairs Committee³⁹ have held hearings on the U.N.'s Oil for

³⁵*The INSLAW Affair*, H. Rep. No. 102-857 (1992).

³⁶*Impeachment of Richard M. Nixon, President of the United States*, H. Rep. No. 93-1305; *Debate on Articles of Impeachment: Hearings Before the U.S. House Comm. on the Judiciary*, 93rd Cong., 2d Sess. (July 24-27, 29-30, 1974); *Impeachment Inquiry: Hearings Before the U.S. House Comm. on the Judiciary*, 93rd Cong., 2d Sess. (Jan. 31-July 23, 1974).

³⁷*Oil for Food Program: Hearing Before the Subcomm. on National Security, Emerging Threats, and Int'l Relations of the U.S. House Comm. on Gov't Reform*, 109th Cong., 1st Sess. (Apr. 12, 2005); *The U.N. Oil for Food Program, Cash Cow Meets Paper Tiger: Hearing Before the Subcomm. on National Security, Emerging Threats, and Int'l Relations of the U.S. House Comm. on Gov't Reform*, 108th Cong., 2d Sess. (Oct. 5, 2004); *The Iraqi Oil-for-Food Program, Starving for Accountability: Hearing Before the Subcomm. on National Security, Emerging Threats, and Int'l Relations of the U.S. House Comm. on Gov't Reform*, 108th Cong., 2d Sess. (Apr. 21, 2004).

³⁸*The United Nations Oil-For-Food Program - A Review of the 661 Sanctions Committee: Hearing Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 109th Cong., 1st Sess. (June 21, 2005); *The United Nations Oil-for-Food Program: Saddam Hussein's Use of Oil Allocations to Undermine Sanctions and the United Nations Security Council: Hearing Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 109th Cong., 1st Sess. (May 16, 2005).

³⁹*Oil For Influence - How Saddam Used Oil to Reward Politicians Under the United Nations Oil-for-Food Program: Hearing Before the Permanent Subcomm. on Investigations of the U.S. Senate Comm. on Homeland Security and Governmental Affairs*, 109th Cong., 1st Sess. (May 17, 2005); *The United Nations' Management and Oversight of the Oil-for-Food Program: Hearing Before the Permanent Subcomm. on Investigations of the U.S. Senate Comm. on Homeland Security and Governmental Affairs*, 109th Cong., 1st Sess. (Feb. 15, 2005); *How Saddam Hussein Abused the United Nations Oil-for-Food Program: Hearing Before the*

Food Program. These hearings have been held simultaneously with an investigation into the same Program by the U.S. Attorney for the Southern District of New York.⁴⁰

- In 2005, the Senate Indian Affairs Committee has investigated the lobbying activities of Jack Abramoff.⁴¹ At the same time, the Justice Department, IRS, and Interior Department have been conducting their own investigations.⁴²
- In 2005, the House Government Reform Subcommittee on the Federal Workforce and Agency Organization has investigated allegations that scientists falsified information regarding the Yucca Mountain nuclear repository.⁴³ The Justice Department is investigating the same matter.⁴⁴
- In 2001, the House Government Reform Committee investigated the Boston FBI field office's use of confidential informants.⁴⁵ The Committee subpoenaed FBI files, direct evidence, such as wiretap logs, and deliberative memos. At the time of this investigation, an FBI agent, John Connolly, was under indictment.⁴⁶
- In 2001, the House Government Reform Committee investigated President Clinton's use of his pardon authority.⁴⁷ The Majority issued 153 requests and subpoenas for documents and ultimately received over 25,000 pages. The U.S. Attorney for the Southern District

Permanent Subcomm. on Investigations of the U.S. Senate Comm. on Homeland Security and Governmental Affairs, 108th Cong., 2d. Sess. (Nov. 15, 2004).

⁴⁰See Judith Miller & Julia Preston, *2 Inquiries are at Odds*, N.Y. TIMES, Jan. 31, 2005, at A8.

⁴¹*In re Tribal Lobbying Matters: Hearing Before the U.S. Senate Select Comm. on Indian Affairs*, 109th Cong., 1st Sess. (June 22, 2005).

⁴²See Susan Schmidt, *Abramoff Cited Aid of Interior Official*, WASH. POST, Aug. 28, 2005, at A1.

⁴³See Matthew L. Wald, *Disagreement over Data on Waste Site*, N.Y. TIMES, Apr. 6, 2005, at A18.

⁴⁴*Id.*

⁴⁵*The FBI's Controversial Handling of Organized Crime Investigations in Boston - the Case of Joseph Salvati: Hearing Before the U.S. House Comm. on Gov't Reform*, 107th Cong., 1st Sess. (May 3, 2001).

⁴⁶See Tom Farmer, *FBI Feels Heat*, BOSTON HERALD, May 14, 2001, at 1.

⁴⁷*The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the U.S. House Comm. on Gov't Reform*, 107th Cong., 1st Sess. (Feb. 8 & Mar. 1, 2001).

of New York, Mary Jo White, was conducting her own criminal investigation at the time.⁴⁸

- From April 1998 to May 1999, the House International Relations Committee and House Science Committee convened hearings on potentially illegal transfers of technology by Lockheed Martin, Loral, and Hughes to China. The House Select Committee on U.S. National Security and Military/ Commercial Concerns with the People's Republic of China also held hearings and issued a report.⁴⁹ While these hearings were being held, the Justice Department and a grand jury were conducting an investigation that led to penalties against the violators.⁵⁰
- In 1997-2000, the House Government Reform Committee conducted its own investigation into possible campaign improprieties by the Clinton Administration and the Democratic party.⁵¹ The Committee had Attorney General Janet Reno testify during hearings and subpoenaed deliberative memos from FBI Director Louis Freeh and Campaign Task Force Leader Charles LaBella. When the Attorney General refused to comply, the Committee held her in contempt. Eventually the Committee received all the documentation it requested.
- In 1997-99, the Senate Governmental Affairs Committee investigated campaign financing while the FBI and the Department's Campaign Finance Task Force was conducting a criminal investigation. The Committee subpoenaed FBI agents, Task Force attorneys, and obtained a number of documents including the notes of special agents, draft affidavits, notes of the Task Force supervisor and internal memos.
- In 1995, the House Government Reform Committee investigated federal law enforcement actions at Waco.⁵² The Committee subpoenaed FBI files, interviewed 20 FBI agents and

⁴⁸David Johnston, *U.S. Attorney in New York will Coordinate Inquiry on Pardons*, N.Y. TIMES, Mar. 14, 2001, at A14.

⁴⁹H. REP. NO. 105-851.

⁵⁰Jeff Gerth & Raymond Bonner, *Companies are Investigated for Aid to China on Rockets*, N.Y. TIMES, Apr. 4, 1998, at A1.

⁵¹*The Role of Yah Lin "Charlie" Trie in Illegal Political Fundraising: Hearing Before the U.S. House Comm. on Gov't Reform*, 106th Cong., 2d Sess. (Mar. 1, 2000); *The Role of John Huang and the Riady Family in Political Fundraising: Hearing Before the U.S. House Comm. on Gov't Reform*, 106th Cong., 1st Sess. (Dec. 15-17, 1999); *The Need for an Independent Counsel in the Campaign Finance Investigation: Hearing Before the U.S. House Comm. on Gov't Reform*, 105th Cong., 2d Sess. (Aug. 4, 1998); *Campaign Finance Improprieties and Possible Violations of Law: Hearing Before the U.S. House Comm. on Gov't Reform*, 105th Cong., 1st Sess. (Oct. 8, 1997).

⁵²*Activities of Federal Law Enforcement Agencies toward the Branch Davidians: Hearings Before the Subcomm. on National Security, Int'l Affairs, and Criminal Justice of the U.S. House Comm. on Gov't Reform*, 104th Cong., 1st Sess. (July 19-21, 24-28, 31 & Aug. 1,

reviewed over a million documents. At the same time, former Senator John Danforth was investigating as a Special Counsel.⁵³

In fact, in four years, the Clinton administration turned over 1.2 million pages of documents (including criminal investigators' files, evidence, and deliberative memoranda) to the House Government Reform Committee alone despite on-going criminal investigations.

There are scores of examples from other committees also:

- For example, in 2002 the House Energy and Commerce Committee investigated the collapse of Enron and its outside auditor Arthur Andersen⁵⁴ while the Justice Department and SEC investigated.⁵⁵ The Committee took testimony from several executives during hearings. In all, there were 30 hearings within the House and Senate between 2001 and 2003.
- In 2002, the House Energy and Commerce Committee investigated Martha Stewart for insider trading allegations involving ImClone stock.⁵⁶ Both Ms. Stewart and ImClone officials were under investigation by the Justice Department.⁵⁷

1995).

⁵³David Johnston, *Ex-Senator Picked by Reno to Head New Waco Inquiry*, N.Y. TIMES, Sept. 9, 1999, at A1.

⁵⁴*Financial Collapse of Enron: Hearings Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. (Feb. 7, 14 & Mar. 14, 2002); *Developments Relating to Enron Corp.: Hearing Before the U.S. House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. (Feb. 6, 2002); *The Findings of Enron's Special Investigative Committee with respect to Certain Transactions between Enron and Certain of its Current and Former Officers and Employees: Hearing Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. (Feb. 5, 2002); *The Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. (Jan. 24, 2002).

⁵⁵Rebecca Smith, *U.S. Puts Task Force on Criminal Probe of Enron*, WALL ST. J., Jan. 10, 2002, at A3; Alex Berenson, *SEC Opens Investigation into Enron*, N.Y. TIMES, Nov. 1, 2001, at C4.

⁵⁶*An Inquiry into the ImClone Cancer-Drug Story: Hearing Before the Subcomm. on Oversight and Investigations of the U.S. House Comm. on Energy and Commerce*, 107th Cong., 2d Sess. (June 13 & Oct. 10, 2002).

⁵⁷Constance L. Hays, *Investigators Said to be Frustrated in Stewart Case*, N.Y. TIMES, Aug. 12, 2002, at C4.

- In 2002, the House Financial Services Committee investigated the WorldCom scandal while criminal and civil cases were pending.⁵⁸ During hearings, analysts and the chairman of the board testified, while other executives refused to testify citing the 5th Amendment.

Finally, the Government Accountability Office (“GAO”) has conducted investigations while the administration was pursuing criminal investigations. For example:

- In 1998-2001, the GAO investigated the actions of FBI investigators in the Wen Ho Lee espionage case.⁵⁹ Mr. Lee was under investigation by the FBI from 1996 until his indictment in 1999.⁶⁰
- In 1999-2000, the GAO investigated the Waco incident while Special Counsel Danforth was still conducting his investigation.⁶¹
- In 1994-96, the GAO investigated the White House Travel Office under the Clinton administration.⁶² This occurred while criminal investigations were being conducted by the Department, the IRS, the Treasury Department Inspector General and the Office of Professional Responsibility.⁶³

B. This Resolution would not Violate Grand Jury Secrecy Rules

The Majority incorrectly argues that disclosure of the requested information would violate grand jury secrecy rules. Federal Rule of Criminal Procedure 6(e) prohibits the disclosure of a “matter occurring before a grand jury,”⁶⁴ and a grand jury has been convened to investigate the leak. As the Justice Department’s own *Federal Grand Jury Practice* manual explains, however:

⁵⁸*Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the U.S. House Comm. on Financial Servs.*, 107th Cong., 2d. Sess. (July 8, 2002).

⁵⁹Letter from the General Accounting Office to the Honorable Arlen Specter, U.S. Senate, *et al.* (June 28, 2001).

⁶⁰Matthew Purdy & James Sterngold, *The Prosecution Unravels - The Case of Wen Ho Lee*, N.Y. TIMES, Feb. 5, 2001, at A1.

⁶¹U.S. GENERAL ACCOUNTING OFFICE, MILITARY ASSISTANCE PROVIDED AT BRANCH DAVIDIAN INCIDENT (Aug. 1999).

⁶²Letter from the General Accounting Office to the Honorable William F. Clinger, Chairman, U.S. House Comm. on Gov’t Reform and Oversight (Sept. 18, 1996).

⁶³U.S. GENERAL ACCOUNTING OFFICE, WHITE HOUSE TRAVEL OFFICE Operations (May 1994).

⁶⁴FED. R. CRIM. P. 6(e)(2).

Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury. . . . *In short, to come within the Rule 6(e) secrecy prohibition, the material in question must ‘reveal some secret aspect of the inner workings of the grand jury.’*⁶⁵

The documentation requested by H. Res. 420 would not betray the “inner workings of the grand jury.” Material created independently of the grand jury has long been held to be outside of the grand jury secrecy rules.⁶⁶ In particular, investigative material gathered by law enforcement agents instead of a grand jury repeatedly has been found to be outside of Rule 6(e).⁶⁷ That information is gathered with an “eye toward ultimate use in a grand jury proceeding” does not invoke secrecy protections.⁶⁸ As long as the investigative information was not collected at the direction of a grand jury nor is presented in a manner that reveals what took place in front of the grand jury, disclosure is proper. In fact, Justice Department disclosure of this material will continue its history of routine disclosure of criminal investigative information in response to pressing congressional inquiries such as this.⁶⁹

CONCLUSION

This resolution of inquiry was necessary because the Bush administration has consistently refused to police itself in the midst of criminal and ethical misconduct. It has permitted a breach

⁶⁵EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, FEDERAL GRAND JURY PRACTICE 40 (Aug. 2000) (emphasis added) (citing *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997); *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir. 1987); *Fund for Constitutional Gov’t v. National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980); *United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978); *United States Industries v. United States Dist. Court*, 345 F.2d 18, 21-22, (9th Cir. 1965); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960)).

⁶⁶*Id.*

⁶⁷*In re Grand Jury Subpoena*, 920 F.2d 235, 242-43 (4th Cir. 1990); *Anaya*, 815 F.2d at 1379-80; *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3rd Cir. 1982); *United States v. Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960).

⁶⁸*Catania*, 682 F.2d at 64.

⁶⁹MORTON ROSENBERG, CONGRESSIONAL RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 29-32 (Apr. 7, 1995). *See also Investigation into Allegations of Justice Department Misconduct in New England – Volume 1: Hearings Before the U.S. House Comm. on Gov’t Reform of the U.S. House of Representatives*, 107th Cong., 1st & 2nd Sess. (2001-02) (testimony of Morton Rosenberg, Congressional Research Service, American Law Division) (listing eighteen distinct congressional investigations that acquired criminal files from the Justice Department).

of national security to go unchecked and to be subject to political machinations. In such times, it is the duty of Congress to hold the administration accountable; unfortunately, this Congress has turned a blind eye to the wrongdoing of this administration. The Majority's rejection of this resolution of inquiry represents not only an abdication of Congress's responsibility but also another example of its predilection for placing partisan interest above national security.

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